

***United States Court of Appeals
for the Second Circuit***



REPLY BRIEF

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ALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

77-4019

NATIONAL LABOR RELATIONS BOARD, :

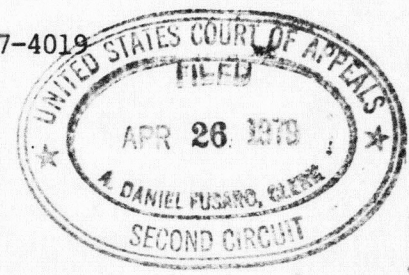
Petitioner, :

v. :

No. 77-4019

LOCAL 259, UNITED AUTOMOBILE, AEROSPACE, :
AND AGRICULTURAL IMPLEMENT WORKERS OF :
AMERICA, :

Respondent. :



RESPONSE OF THE NATIONAL LABOR RELATIONS
BOARD TO THE UNION'S MOTION TO VACATE JUDGMENT
AND SET ASIDE THE BOARD'S ORDER OR, IN THE ALTER-
NATIVE, TO REMAND THE CASE TO THE BOARD

To the Honorable, the Judges of the United States Court of Appeals
for the Second Circuit:

The National Labor Relations Board, in reply to respondent Union's
motion to vacate the Court's judgment herein and set aside the Board's
order or, in the alternative, to remand the case to the Board for the
purpose of reopening the record, states:

1. The above-captioned case involved the discharge of Anthony
Dazzo (hereafter "Dazzo"), a supervisor with Atherton Cadillac (hereafter
"the Company"). The Board found that the Union had violated Section
8(b)(1)(B) of the Act by requesting that the Company discharge Dazzo
and by conditioning the grant of concessions in bargaining upon compliance
with that request. The Board's order issued on June 30, 1976 and was
enforced by this Court from the bench on June 30, 1977.

2. In the course of proceedings before the Board, counsel for the
General Counsel introduced, as General Counsel's Exhibit 3, a letter signed
by Company President Atherton. The Board concluded that the letter and the
testimony of Dazzo regarding it were hearsay evidence as to why the Company

discharged Dazzo, and further concluded that no adverse inference could be drawn from the failure of the General Counsel to call Atherton to testify regarding the letter and Dazzo's discharge, since Atherton was equally available to both sides. The Board found substantial evidence other than General Counsel's Exhibit 3 and Dazzo's testimony regarding it to support a finding that the Union had violated the Act. The Court agreed with the Board's conclusions.

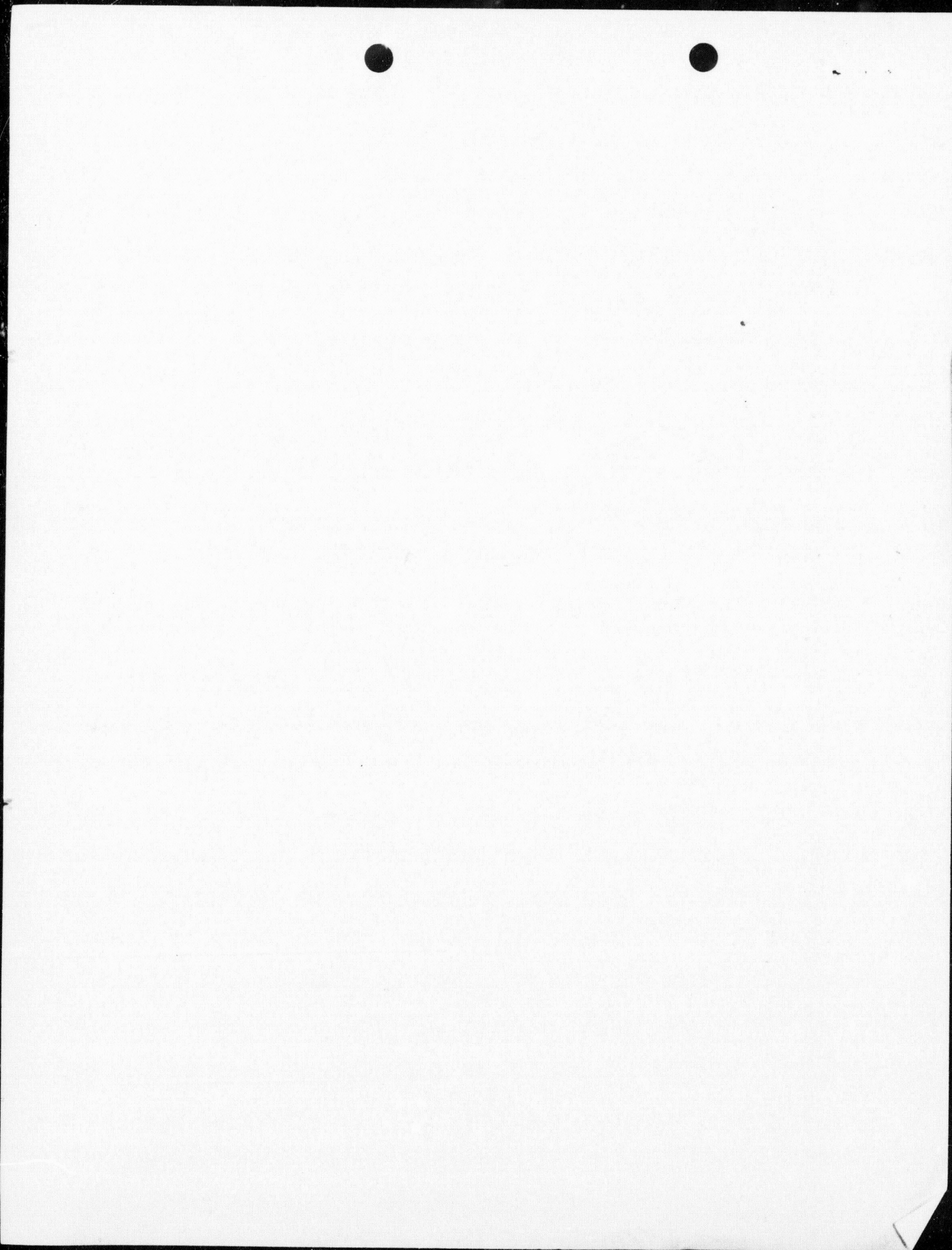
3. Subsequently, Dazzo filed a civil suit against both the Company and the Union for money damages arising from the same facts as those underlying the unfair labor practice case. In the course of defending the civil action, the Union obtained information from the Company suggesting that General Counsel's Exhibit 3 might have been a forgery. The Union thereupon requested that the Board's Regional Director for the 29th Region release information concerning General Counsel's Exhibit 3 from the Region's investigative file. On September 26, 1978, the Region released to the Union a copy of a file note indicating that the Company's basic position with regard to Atherton's letter at the time of the Region's investigation was that it was either a forgery or a copy of a letter executed by Atherton with an additional paragraph inserted by Dazzo without Atherton's knowledge or consent. On March 6, 1979 the Board denied the Union's motion for reconsideration on the ground of lack of jurisdiction. On March 30, 1979, the Union filed a motion with the Court requesting the Court to vacate its judgment of June 30, 1977, and set aside the Board's order or, in the alternative, to remand the case to the Board for the purpose of reopening the record and adducing further evidence regarding General Counsel's Exhibit 3.

4. Although the Board did not rely on General Counsel's Exhibit 3 or upon Dazzo's testimony concerning it in making its unfair labor practice findings against the Union, the Board did determine that no adverse inference could be drawn from the General Counsel's failure to call Atherton as a witness. Since the Region's investigative files are not part of the record before the Board, the Board had no knowledge of the contents of such files at the time this case was originally before the Board and the Court. Accordingly, the Board has no objection to the Court's remanding this case to the Board so that it may reopen the record for the limited purpose of adducing evidence with respect to the authenticity of General Counsel's Exhibit 3.

Elliott Moore (JCM)
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D.C.

this 24th day of April, 1979.



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v.	:	No. 77-4019
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AND AGRICULTURAL IMPLEMENT WORKERS OF	:	
AMERICA,	:	
	:	
Respondent.	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Board's Response to the Union's motion to vacate judgment and set aside the Board's order or, in the alternative, to remand the case to the Board in the above-captioned case has this day been served upon the following counsel at the addresses listed below:

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Elliott Moore (JCM)
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D.C.

this 24th day of April, 1979.